No. 349.

In Supreme Court of United States

October, Term 1900.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS.

vs.

MOLLIE F. FERRIS, ET AL.

BRIEF OF PLAINTIFF IN ERROR REPLYING TO MOTION TO DISMISS OR AFFIRM.

This proceeding in error seeks to question the validity of an Act of the Legislature of the State of Texas of date April 22nd 1897, which refuses to corporations litigant the right to take the ex-parte depositions of an adversary under the provisions of the law, and with like rights and privileges accorded to other suitors, upon the ground that said statute denies plaintiff in error the equal protection of the law, and is therefore in conflict with the Fourteenth Amendment to the Federal Constitution. It is admitted by the motion and brief of defendants in error that the federal question was properly raised and preserved throughout the various stages of the litigation. Under the laws of the State of Texas as they had existed prior to the Act of April 22nd 1897, either party to a suit could take the depositions of the opposite party upon interro-

gatories filed in the cause. These interrogatories could be leading in their character, no notice of their filing was required, or service of copies, the examination was ex parte, and if the party refused to answer or answered evasively they were taken as confessed against him. These provisions are found in the Act of Feb. 15th 1858, as set out in Chapter Three, Title Forty of the Revised Statutes of 1895, and are as follows:

Article 2293. Either party to a suit may examine the opposite party as a witness, upon interrogatories filed in the cause, and shall have the same process to obtain his testimony as in the case of any other witness, and his examination shall be conducted, and his testimony received, in the same manner and according to the same rules which apply in the case of any other witness, subject to the provisions of the succeeding articles of this chapter.

Article 2294. It shall not be necessary to give Notice of the filing of the interrogatories or to serve a copy thereof upon the opposite party, before a commission shall issue to take the answers thereto, nor shall it be any objection to the interrogatories that they are leading in their character.

Article 2295. A commission to take the answers of the party to the interrogatories filed shall be issued by the clerk or justice, and shall be executed and returned by any authorized officer as in other cases.

Article 2297. If the party interrogated refuses to answer the officer executing the commission shall certify such refusal, and any interrogatory which the party refuses to answer, or which he answers evasively shall be taken as confessed.

The act of 1858, is substantially the same as that of May 13th 1846 (Hartley's Digest Art. 736 p. 254) which is as follows:

Be it further enacted that the party interrogated shall answer under oath, and categorically each of the questions put to him, unless he can not do so without criminating himself, and if he refuse or neglect to do, the facts concerning which he shall have so refused or neglected to answer shall be taken as confessed.

These statutes have been upheld, and applied from the earliest days to the present both as to persons, (Pool vs. Pickett 8 Tex. 121; Teal vs. McDonald 13 Tex. 349; Meyer vs. Claus 15 Tex. 517; Blackman vs. Green 17 Tex. 322; Friend vs. Miller 62 Tex. 177) and as to corporations, (G. C. & S. F. Ry. vs. Nelson 5 T. C. A. 388; H. & T. C. Ry. vs. Reason 61 Tex. 613).

On April 22nd 1897 (See Acts of 25th Leg. 117) an act was passed adding to the Statutes Article 2293a which is as follows:

"Where either party to a suit is a corporation, neither party thereto shall be permitted to take ex parte depositions."

On January 28th 1899 James Ferris, was killed on a crossing by a locomotive of the plaintiff in error, a railroad corporation. On January 31st 1899, the heirs of said James Ferris among whom are Sam Ferris, and Frank Ferris, his sons, filed this suit, for their damages by reason of his death. On June 20th 1899, there was judgment for plaintiffs (defendants in error) for sum of ten thousand dollars of which $900.00 was apportioned to said Sam Ferris and $1000.00 to said Frank (Price Franklin) Ferris. (Tr. pps. 35—36).

On the 12th day of May 1899, prior to the trial, plaintiff in error, propounded to said Sam Ferris and Frank Ferris ex parte interrogatories under the statutes above quoted, so framed that if taken as confessed, their right of recovery would be precluded. Commission was regularly issued with the interrogatories attached and placed in the hands of a competent officer. They each refused to answer, and the officer so certified, and filed said interrogatories, commission and certificate in the papers of the cause on May 20th 1899. No motion was made to suppress the same. Upon the trial plaintiffs in the court below, defendants in error here, offered as a witness the said Sam Ferris. The company objected to his testimony upon the ground that he had refused to answer the interrogatories legally propounded to him, and thereupon offered in evidence the said interrogatories propounded to him and his co-plaintiff Frank Ferris, defendant in error here, together with the certificate of the clerk certifying such refusal, and moved the court first, that said matters enquired about in said interrogatories be taken as confessed against each of said parties Sam and Frank Ferris and that the said Sam Ferris be not

permitted to testify touching the matters covered by such interrogatories. (See Bill of Exception No. 2, pps. 38 and 39 Record). This motion was overruled upon the specific ground that under the act of April 22nd 1897, ex parte depositions could not be taken when either party is a corporation, and plaintiff in error excepted upon the ground that such act was in contravention of the fourteenth amendment to the federal constitution in that it deprived plaintiff in error of the equal protection of the law. This contention was successively made at every stage of the litigation, was decided adversely to plaintiff in error by the Court of Civil Appeals, and a writ of error having been refused by the Supreme Court, writ of error was allowed to the former Court which holds the record.

No question is made of the propriety or relevancy of the interrogatories, nor is the contention made that they embrace such matter as that if taken as confessed against said Sam Ferris and Frank Ferris reversal would not necessarily follow. It will not be necessary, therefore, to encumber the record, with the interrogatories.

The motion to dismiss or affirm is predicated upon two propositions: First that the judgment can be sustained upon grounds not federal in their character; and Second, that the proposition, that a State can not deny to a corporation litigant those remedies, and rights which it confers upon other suitors in like cases, without infringing upon the guaranties of the Federal Constitution is frivolous, and should not abide a regular hearing before the Court.

In reply to the first propositon it is submitted

FIRST:

When the record makes it clear that the judgment of the State Court rests upon the federal question, this Court will not indulge

in conjecture, or speculation, as to whether there may or may not be grounds independent of the federal question, upon which it may sustain the judgment.

In Klinger vs. Missouri 13 Wallace 257, it is said:

"When it appears by the record that the judgment of the State Court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears, that the Court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this Court will not take jurisdiction of the case even though it might think the position of the State Court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then if the independent ground on which it might have been based, was a good and valid one, sufficient of itself to sustain the judgment this Court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one it will be presumed that the State Court based its judgment upon the law raising the federal question and this Court will then take jurisdicton."

In Neilson vs. Lagow, 12 Howard 110; error to the Supreme Court of Indiana, the federal question relied upon to confer jurisdiction was the construction of an Act of Congress, and it was sought to defeat the jurisdiction by the contention that the State Court might have based its judgment upon other grounds. Curtis J. says:

"If it had appeared affirmatively in the record that the Supreme Court did decide that the deed conveyed only a life estate, this Court would not enquire into the correctness of that decision; but when put to infer what points may have been raised, and what that Court did decide, we can not infer that they decided wrong; otherwise nothing would be necessary in any case to prevent this Court from reversing an erroneous judgment under the twenty fifth section of the Judiciary Act but that counsel should raise on the record some point of local law, however erroneous and suggest that the Court below may have rested its judgment thereon."

In the case at bar it is clear from the record that the trial Court did base its judgment on the federal question, and counsel in order to defeat jurisdiction suggests in argument grounds other than the federal question upon which it might have based same.

We beg to call the Court's attention to the bill of exception p. 39 of the record.

"And thereupon the defendant moved the Court that the said interrogatories be taken as confessed against each of said plaintiffs Sam Ferris and Frank Ferris, and that said Sam Ferris should not be permitted to testify upon the proposition covered by such interrogatories. *That thereupon plaintiffs* contended that under the act of the Legislature of the state of Texas approved April 22nd 1897, where either party to a suit is a corporation neither party is permitted to take ex parte interrogatories; whereupon the Court sustained such contention and overruled the motion of defendant that said interrogatories be taken as confessed against Sam Ferris and Frank Ferris and overruled said motion of defendant that said Sam Ferris be not permitted to testify upon those propositions embodied in the interrogatories above set out. Whereupon defendant excepted upon the ground that said statute of 1897 is contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, in this that it deprives defendant corporation of the equal protection of the laws."

It thus clearly and unmistakably appears first that the act of 1897, was the sole ground urged by defendants in error against the motion of the company, and second that the Court based its judgment solely upon this ground.

After this ruling of the Court had been duly excepted to by the company upon the ground that the statute denied it the equal protection of the laws, defendants in error asked permission to introduce testimony to ascertain whether the refusal of the parties Sam Ferris and Frank Ferris was willful, and thereupon R. J. Griesenbeck the officer commissioned to take their answers testified that when he informed them that he had come to take their answers to the interrogatories they were in the presence of their uncle S. H. Gillespie with whom they were living; that Gillespie then said in their presence that he could not permit him to ask them any questions, or that he could not permit them to answer any question, *and that he did this under instructions of attorneys*, and being thus prevented from taking the answers the interrogatories were

returned into Court. (See pages 39 and 40 of the record). No ruling or finding of the Court is made upon this testimony.

The record then stands thus: The trial court clearly bases its judgment upon the federal question. For this Court to refuse jurisdicton upon the ground that the question can be properly determined by the local law, it will become necessary, for it to do, what the trial court refused to do, to wit: Find *as a fact* that the refusal of the parties was not willful. It is, to put the matter in the light most favorable to the motion, at least a matter of grave doubt, whether any question, other then the validity of the statute of 1897, could or should have entered into the decision. In this state of the case it is submitted that when the State Court clearly bases its judgment upon the federal question, this Court will not assume to decide it upon the other and different grounds unless it clearly appears that the judgment is obviously correct upon other grounds. It is further submitted that when the State Court rests its judgment upon the federal question, this Court will not assume to determine the point upon other and different grounds, dependent upon matters of fact, which the trial court refused to determine; and upon questions of practice, themselves dependent upon decisions of the local tribunals which the trial court did not undertake to interpret or apply. The course followed by defendants in error leaves no doubt upon the matter. They object to the motion of plantiff in error solely for the reason that it contravenes the statute of 1897. The Court having based its judgment solely upon that statute some evidence is introduced, for the purpose as stated, of ascertaining whether the refusal is willful. But no finding or ruling is asked or had from the trial court, upon that matter. No finding or ruling thereon is made by the Court of Civil Appeals. (See opinion page 164 of the record), although that court's findings on matters of fact are final. It is submitted therefore that the

action of the trial court complained of rests wholly upon the federal question and that no question of local law entered into its determination.

SECOND:

For this Court to refuse to entertain jurisdiction upon the ground that the question involved may have been correctly decided under the local law, will compel it to examine and decide a question of fact which the several State Courts declined to do, to wit: It must decide that the refusal to answer was not willful, and this it will not do.

The bill of exceptions clearly shows that the State Court based its action wholly upon the statute and that it made no finding upon the issue of fact. The trial court having once (p. 39) specifically declared that its action was based upon the statute, it is not conceived that it was the duty of plaintiff in error, to ask the Court to negative all other conceivable reasons under the local law, which the ingenuity of counsel can conjure up, which might be urged to sustain its action. The court having once clearly stated the basis of its action if defendants in error wished it to shift its ground, to the position that because the refusal of the parties was not willful the interrogatories ought not to be taken as confessed, there should have been a finding that the refusal was not willful. The finding was not made, and it is submitted that this Court can not make such finding in order to defeat its jurisdiction.

THIRD:

Should the Court deem it proper to consider a question of fact not considered and not decided by the trial court it is submitted that for the trial court to have decided that the interrogatories should not have been taken as confessed under the law as it existed prior to the act of 1897, upon the ground that the refusal to answer was not willful, would have been to decide incorrectly, and

this court, will not indulge in that presumption, but will rather presume, that the decision rested wholly upon the federal question.

Both Frank Ferris and Sam Ferris were witnesses to the transaction, under investigation. The remarkable verdict rendered, which according to the Court of Civil Appeals (see p. 165 of the record) is "against the preponderance of the testimony especially upon the issue of contributory negligence" rests largely upon the testimony of Sam Ferris, Frank Ferris although present (see testimony of Sam Ferris p. 62) is never placed upon the stand, though he is in attendance upon Court nor do either of them ever at any time either offer to answer the interrogatories, or submit any reason for their refusal to answer. Counsel in argument here pleads infancy. Sam Ferris was fourteen years of age and Frank Ferris is ten. No suggestion is made that either by reason of tender years is unable to answer or that he is other than an intelligent and competent witness. The strange contention is made that the refusal is not willful, and yet never at any time is an excuse made for the refusal, none is even proffered, either to the officer undertaking to serve the commission and take the answers, to the trial court, or to this court. They stood upon the Statute of 1897. Acting under the advice of counsel they refuse to answer (p. 40). In the light of these proceedings the contention that the refusal to answer is not willful seems extraordinary. Not only is it willful, but it seems to be the deliberate conception and advice of counsel. At least the parties so conceived and it is not denied in the record by counsel for defendants in error. It is admitted that under the decisions of this State where the refusal to answer is not willful, where there is any sufficient exuse therefor, the interrogatories will not be taken as confessed. Let us examine the cases cited by defendants in error. In Bounds vs. Little 75 Tex. 318, it was shown that the reason that the party did not

answer was that the notary insisted upon the answer yes or no, to questions that did not permit of such answers, that the party declined to answer for that reason, and not willfully; that he told the notary that he could not answer the question yes or no, but that he would be present next day at the trial ready to testify, and that thereupon the notary told him that under the circumstances he would not answer them himself. The Court said:

"To give effect to the law it was provided that upon the refusal of the party interrogated to answer, the interrogatories should be taken as confessed upon the certificate of the officer to that effect. But we apprehend that it was only in cases of a deliberate refusal that this provision was intended to apply. It certainly was not intended that the certificate of the officer should be conclusive in every case. We think therefore that if it be shown that he did not refuse, or that he declined under a mistake as to his rights and not contumaciously, or that the notary induced him to believe that he should not answer, the interrogatories should not be taken as confessed, provided that at the trial he shows that he is willing to answer them."

In Robertson vs. Melaskey 84 Tex. 561, when the notary presented the interrogatories the party asked for time to consult his attorney which was declined and a refusal to answer certified. The party wrote to his attorney who instructed him to answer, and he thereupon went to the notary and offered to answer which was refused him. Under these circumstances it was held that it was error to take the interrogatories as confessed. In Wofford vs. McKinney 90 Texas 655, the party asked time to consult his attorney and to examine his papers which was refused, and the Court held that such refusal of the party to answer was not contumacious and declined to take the interrogatories as confessed. In each case a valid excuse is shown and there is always the offer to answer. Here the parties are informed that they are required to answer. Gillespie, their uncle, informs the officer in their presence, that he will not permit them to hear the interrogatories or answer thereto, and that he did this under the advice of his at-

torneys. They proffer no exuse for not answering, they do not deny that they were so advised by their attorneys, the attorneys do not deny it, they never offer to answer. Frank Ferris is present in Court, and does not take the stand to testify in his own behalf although he was an eye witness, and the case is so weak that the preponderance of the testimony is against the verdict. Neither Frank Ferris or Sam Ferris are shown to be of such low grade of intelligence, as to afford any reason why they should not answer these interrogatories as other parties. In the trial court where it is moved that the interrogatories asked be taken as confessed, they rely wholly upon the statute of 1897. Under these circumstances to contend in this Court that it is obvious that the refusal to answer was other than deliberate and willful is extraordinary, and is an argument of counsel, an afterthought to defeat jurisdiction.

FOURTH:

In answer to the contention that the statute of 1858, does not apply to minors, and that minors under the general law, can not be compelled to make answer to discovery, it is submitted:

1. No Texas Court has held that the statute of 1858, does not apply to minor parties, and this Court to avoid the decision of the federal question, will not place a construction upon the statute not put upon it by the State Courts, such construction not being justified by the terms of the statute itself.
2. While under the peculiar circumstances of special cases courts of equity have relieved infants from making answer to bills of discovery, no text writer, and no decision, lays down the absolute rule, that minors are exempt from discovery, and from the operation of statutes providing for the preliminary ex parte examination of parties to suits. In the case at bar no special circumstance save minority was urged, and it is asked

that this Court find, what the lower Courts did not find, that by reason of such minority the parties should be exempt from answering, which finding of fact, it is believed it will not make.

FIFTH:

A corporation is a "person", entitled to the equal protection of the laws, and when it is denied equal access to the Courts, and equal use of those remedies provided by the laws of the State for other suitors it is denied the equal protection of the laws guaranteed by the XIV. Amendment to the Federal Constitution.

Defendant in support of his proposition that this contention is frivolous cites the case of A. T. & S. F. Ry. vs. Mathews 174 U. S. 97, wherein was sustained a statute of the State of Kansas providing that in actions against railroads for damages from fire, proof that the fire was caused by the railway, and of the amount of damages created a prima facie case against the railway, and if recovery should be had, a reasonable attorneys fee should be allowed. That case rests upon the police powers of the State, and its right to regulate peculiarly hazardous occupation in the interest of the common safety. It will be remembered however that Justices Harlan, Peckham, Brown and McKenna dissented from the decision and Justice Harlan in the disenting opinion declared that upon the principles declared in Gulf, Colorado and Santa Fé vs. Ellis, 165 U. S. 150, the statute was obnoxious to the fourteenth amendment. Candor compels the writer to state that the profession has been ill able to differentiate the two cases, and that if the Texas statute was wrong the Kansas statute could not be right. Be that as it may the Mathews case clearly rests, upon the police power of the state, and therein is found the justification of almost, if not all, of the state legislation hostile to corporate capital, such for example as statutes denying to railroad companies the application of the doctrine of fellow servants

when the servant, was engaged in a hazardous employment. No such principle is involved here. It is a bold and palpable attempt to deny to one class of suitors those remedies and rules of law accorded to all others. Justice Brown said in the Ellis case that "a state has no more power to deny to corporations the equal protection of the laws than it has to individual citizens." Judicial tribunals are provided for the equal protection of every suitor, and when remedies are provided and rights accorded to ordinary suitors which are denied to corporations, a special code is prepared for the latter, and their rights are not determined by the general law of the land. Judge Bradley enumerates in Bowman vs. Lewis 101 U. S. 22 among the rights protected by the fourteenth amendment "the equal right to resort to the appropriate court for redress."

In Dunkee vs. City of Janesville 28 Wisc. the Supreme Court of Wisconsin in overthrowing as unconstitutional a charter granted by statute which provided that no costs should be recovered against the City in suits to set aside a tax assessment or to enjoin the collection of taxes said: The clause "law of the land" is held to mean a general public law, equally binding upon every member of the community * * * * It is obvious there can be no *certain* remedy in the laws when the legislature may prescribe one rule for one class of suitors and another for all others under like circumstances * * * * Certainty of remedy implies uniformity of remedy and equality of rights and privileges in all things respecting it, which can only be obtained by general laws equally binding upon every member of the community."

Justice Field in ex parte Virginia 100 U. S. 367 discussing the Fourteenth Amendment said:

> "And yet the reach and influence of the amendment are immense. It opens the courts of the country to every one *on the same terms, it assures to every one the same rules of evidence and modes of proceedure.*"

Again in Barbier vs. Conolly 113 U. S. 27. this great jurist says:

"The Fourteenth Amendment in declaring that no state "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws undoubtedly intended not only that there should be no arbitrary deprivation of life, or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; *that they should have like access to the courts of the country for the protection* of their persons and property."

While no case directly in point has ever been before this court these declarations assert the principle that the protection of the amendment extends to remedies as well as rights, and that one set of remedies for the same rights are not to be prescribed for one class of suitors, and another set for another class, but that all shall be governed by the same general law.

It is argued, however, that inasmuch as the law provides that when a corporation is a party, neither party to the suit shall take ex parte depositions; there is no discrimination since it applies to both parties to the litigation. This argument is well met by the Supreme Court of Mississippi in Chicago. St. L. & N. O. Ry. vs. Moss, 60 Miss. 641—652, which involved the validity of a statute, authorizing the taxing of an attorney's fee against the appelant, "whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this state against any corporation."

It will be noted that the provision applied to both parties to the litigation—both citizen and corporation. The court in overthrowing the statute upon the same grounds here insisted upon, says:

"All litigants, whether plaintiff or defendant, shall be regarded with equal favor by the law, and before the tribunals for adminis-

tering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances. There may be different rules for appeals and their incidents in different classes of cases, determined by their nature and subjects, *but not with respect to the person by or against whom they are instituted.* The subjection of every unsuccessful appellant to a charge for the fee of the attorney for the appellee would afford no ground for complaint as unequal, for it would operate on all, and such a rule for the unsuccessful appellant in certain causes of action, tested by the nature and subject of the actions will be equally free from objection, upon the ground of its discriminating character; but to say that where certain persons are plaintiffs, and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens, not imposed upon unsuccessful appellants generally, is to deny the equal protection of the law to the person thus discriminated against. It is an unwarranted interference with the due course of law, prescribed for litigants generally. The act was intended to deter from the appellate courts corporations, against whom judgments should be rendered for damages, or citizens of this state suing them for damages. It was conceived in a spirit of hostility to citizens, as plaintiffs, or corporations, as defendants in such actions. In either view it is partial and discriminating against classes of litigants, denying them access to the appellate courts on the same terms, and with the same incidents as other litigants, who may be plaintiffs or defendants in actions for damages. It is not applicable to all suitors alike in the class of actions mentioned by it. An act, which is partial in its operation intended to deprive particular individuals or corporations of the equal benefits of the general law, is unwarranted and void."

"The equal protection of the laws is a pledge of the protection of equal laws." It is submitted therefore that the act of 1897 is violative both of the letter and the spirit of the Fourteenth Amendment, that by it corporations litigant are denied the rights and remedies, provided for other suitors by the general law, and that thereby plaintiff in error has in this trial been denied the equal protection of the law. It is idle to contend that such a question is frivolous. It is submitted to the Court in the utmost good faith, and it is asked that the motion to dismiss or affirm be overruled, or in the alternative that its final determination be reserved for final hearing upon the merits.

The Missouri, Kansas & Texas Railway Company of Texas,
Plaintiff in Error.

By H. M. Garrett Counsel.